IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2328 OF 2005

IN

SUIT NO.2143 OF 2005

...

M/s.Candes and Kunder
Construction ...Plaintiff

v/s.

Mr.Surendra Poojari
and others ...Defendants

...

Mr.D.S.Mehta i/b G.S.Bhatt for the Plaintiff.
Mr.D.D.Madon with Mr.R.D.'souza i/b A.S.Rai for the Defendant No.1.
Mr.P.K.Samdhani i/b H.S.S.Murty for Defendant No.2.
Mr.Anuj Narula i/b Jhangiani Narula & Associates for Defendant No.3.

...

CORAM: D.K.DESHMUKH, J.

DATED: 18TH JUNE, 2007

P.C.:

1. This Notice of Motion is taken out by the Plaintiff for a mandatory interim order for placing the Plaintiff in possession of the property or in the alternative for appointment of the court receiver or in the alternative for an order of temporary injunction.

2. The suit is filed under Section 6 of the Specific Relief Act for restoration of possession of land admeasuring 854.28 sq.mts. bearing S.No.1176 situated at village Eksar, I.C.Colony, Borivali, Mumbai. The Plaintiff is a partnership firm consisting of two partners, one Mrs. Hemlata M. Kunder and Dr.F.P.Candes-Defendant No.2. The case of the Plaintiff is that the Plaintiff had entered into an agreement with the owners of the land for development of the property. Defendant No.3 is one

of the owners of the land. According to the Plaintiff, the firm was put in possession of the property for the purpose of construction and that the firm without authority of law was dispossessed from the property on 25-2-2005. The Plaintiff relies on several documents including the agreement between the owner and the Plaintiff to claim that the Plaintiff was in possession of the property. The agreement on which the Plaintiff relies is dated 7th August, 1984. According to the Plaintiff, the Plaintiff thereafter submitted building plans for sanction to the Planning Authority. Building plans were sanctioned, commencement certificate was granted. The Plaintiff started digging work for the purpose of carrying out construction. But according to the Plaintiff, on 25-2-2005 the Defendant No.1 dispossessed the Plaintiff.

3. I have heard the learned Counsel for both sides. I have also perused the record. The Plaintiff relying on clause 62 of the agreement between the parties namely the owner and the Plaintiff, read with clause 26 claims that for the purpose of carrying on construction the Plaintiff was put in possession of the land and that the Plaintiff was dispossessed on

25-2-2005. But perusal of the agreement shows that the development was to be carried on by the Plaintiff on behalf of the owner on the basis of power of attorney executed by the owner in favour of the Plaintiff. Thus, the owners appear to be in possession of the property. Therefore, if the Plaintiff is in possession of the property for the purpose of carrying on construction on the basis of power of attorney executed in its favour, the actual possession will be that of the owner and not of the power of attorney holder. A submission was made, however, that as per Clause 21 of the agreement between the parties, the outgoings of the property were paid by the Developers after the date of possession and that owner has forwarded the bills of the property taxes received by the owners to the Plaintiff for payment and therefore, it shows that it was the Plaintiff who was in possession of the property. Perusal of Clause 21, however, shows that clause does not say anything about the liability of the Developer to pay the outgoings of the property after possession is handed over to him. It only says that before the date of handing over of possession to the Developer, the owner will be liable to pay the outgoings and they shall be apportioned between the

owners and the Developers. Clause 21 does indicate that at some point of time the possession was contemplated to be handed over by the owners to the Developer. However, so far as the property taxes actually paid are concerned, an averment has been made in the plaint that those property taxes have been made by the Developer and the Developer is entitled to claim apportionment of those taxes. Now this averment clearly shows that the taxes that have been paid by the Developer are for the period before handing over of the possession. Nowhere on the record payments of property taxes after the alleged date of handing over of possession are produced. Thus, prima facie, it appears that though the Plaintiff-firm was in possession of the property it was in possession of the property for the purpose of carrying out development as a power of attorney holder of the owner and it was not in possession in its own rights.

. In my opinion, one aspect which really non-suits the Plaintiff is that the foundation of the suit of the Plaintiff is that the Plaintiff was dispossessed on 25-2-2005. Admittedly, Defendant No.2 is the partner of the Plaintiff-firm. Admittedly, the

Defendant No.2 had taken out Chamber Summons No.577 of 2005 in a suit filed by the Plaintiff firm seeking specific performance of the agreement between the parties and in paragraph 7 of the affidavit filed in support of that Chamber Summons, the Defendant No.2 states that the Defendant No.1 dispossessed the Plaintiff-firm on 1-3-2005 and therefore a complaint was also made to the Police authorities. Perusal of that complaint shows that in that complaint even the exact time when the Defendant No.1 is supposed to have dispossessed the Plaintiff-firm is stated. The statement made on oath by the Defendant No.2 who is partner of the Plaintiff-firm has been referred to in the affidavit in reply filed by the Defendant No.1, but the Plaintiff has chosen to ignore it. The Plaintiff has not said anything about it. When during the course of argument the learned Counsel appearing for the Defendant No.1 pointed out that averment, on behalf of the Plaintiff nothing was stated. Thus, there is clear variance between the versions of the Plaintiff-firm which consists of two partners in relation to the date and time of dispossession. If the version of the Defendant No.2 is to be accepted, on 25-2-2005 it was the Plaintiff-firm, which was in possession and therefore

the present suit filed on the allegation that the forcible dispossession took place on 25-2-2005 cannot be accepted.

It is, thus, clear that the Plaintiff has not been able to make out any prima facie case and therefore the Plaintiff is not entitled to any interim relief. Notice of Motion is, therefore, disposed of.

At this stage a request is made that ad-interim order which is presently operating should be continued. As, I have found that the Plaintiff has been non-suited because of the statement made by the partner of the Plaintiff itself, in my opinion, it will not be appropriate to continue any ad-interim order. Request is, therefore, rejected.

...